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COURT OF CRIMINAL APPEALS
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PD-0677-21

IN THE COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
3/24/2022
DEANA WILLIAMSON, CLERK

OF THE STATE OF TEXAS

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HAROLD GENE JEFFERSON,

Appellant,

V.

THE STATE OF TEXAS,

Appellee.

****

On Appeal from the Court of Appeals
Eleventh Judicial District, Eastland, Texas
Cause Number 11-18-00184-CR
And the 104th Judicial District Court of Taylor County, Texas
Honorable Lee Hamilton, Judge Presiding
Trial Court Cause Number 20708-B

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STATE'S BRIEF ON THE MERITS

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James Hicks
Criminal District Attorney
Taylor County, Texas
300 Oak Street, Suite 300
Abilene, Texas 79602
325-674-1261
325-674-1306 FAX

BY: Britt Houston Lindsey
Assistant District Attorney
300 Oak Street, Suite 300
Abilene, Texas 79602
State Bar No. 24039669
LindseyB@taylorcountytexas.org

PD-0677-21

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HAROLD GENE JEFFERSON

V.

STATE OF TEXAS

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IDENTITY OF PARTIES AND COUNSEL

Appellant:

Harold Eugene Jefferson

Appellee:

State of Texas

Trial Attorney for Appellant:

Lynn Ingalsbe
Attorney at Law
1065 S. 3rd Street
Abilene, Texas 79602

Appellate Attorneys for Appellant:

Jacob Blizzard
Sarah Durham
Blizzard & Zimmerman, P.L.L.C.
441 Butternut St.
Abilene, Texas 79602

Trial Attorneys for the State of Texas:

Joel Wilks

Zach Gore
Assistant District Attorneys
Taylor County Courthouse
300 Oak St., Suite 300
Abilene, Texas 79602

Appellate Attorney for the State of Texas:

Britt Lindsey
Assistant District Attorney
Taylor County Courthouse
300 Oak St., Suite 300
Abilene, Texas 79602

Presiding Judge:

Honorable Lee Hamilton
104th District Court
Taylor County Courthouse
300 Oak St.
Abilene, Texas 79602

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STATE'S BRIEF ON THE MERITS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State of Texas, by and through her Assistant Criminal District Attorney, Britt Houston Lindsey, submits this Brief on the Merits pursuant to Tex. R. App. Proc. 70.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was requested by both Appellant and the State but was not granted.

STATEMENT OF PROCEDURAL HISTORY

Harold Gene Jefferson (Appellant) was indicted on January 27, 2017 for sexual assault and indecency with a child by contact of a child younger than 17 years of age. A motion to amend the indictment was filed on June 4, 2018 adding two counts of sexual assault. Appellant was found guilty or all four counts by a jury on June 28, 2018 and punishment was assessed at 35, 45, 45, and 25 years, to run concurrently. Appellant filed a motion for new trial alleging ineffective assistance on July 24, 2018 and a hearing was held on August 17 and 30, 2018. The motion was denied by written order on September 10, 2018.

Appellant appealed to the Eastland Court of Appeals, alleging in two grounds that trial counsel was constitutionally ineffective and that the judgment as to two counts was void under *Nix v. State.* On June 17, 2021 the Eastland Court issued an opinion affirming the trial court. Appellant timely filed a motion for rehearing on August 2, 2021, which was denied on August 5, 2021.

STATEMENT OF THE CASE

This is an appeal from convictions for three counts of sexual assault and one count of indecency with a child. Punishment was assessed at 35, 45, 45, and 25 years, to run concurrently. Appellant appealed in two

points of error, arguing in Issue One that Appellant's trial counsel was ineffective in failing to secure an expert and present a defense based on erectile dysfunction and in failing to object to the indictment, and arguing in Issue Two that the judgment was void as to two counts under *Nix v. State*. Appellant now petitions this Court, arguing in Ground One that the indictment was improperly amended under Tex. Code Crim. Proc. Ann. art. 28.10 and in Ground Two that trial counsel was ineffective in failing to object to the indictment.

ISSUES PRESENTED

1. **May Appellant complain that the indictment was improperly amended when no error was preserved in the trial court and that argument was not made in his original brief to the court of appeals?**

2. **Was Appellant's trial counsel constitutionally inefficient for not making a novel argument based on unsettled law in the trial court which no case law currently supports when he had an objectively strategic reason for proceeding on the amended indictment?**

SUMMARY OF THE ARGUMENT

Appellant argues that the court of appeals erred in its analysis of Article 28.10 and that the indictment was improperly amended. However, the Court's analysis of 28.10 was dicta in its evaluation of Appellant's

ineffective assistance argument, observing that there was case law favoring such an amendment even had trial counsel objected. No objection from trial counsel appears in the record and no objection to the indictment was made in Appellant's motion for new trial, which alleged that trial counsel was ineffective in not presenting a defense based on Appellant's erectile dysfunction. No error as to the indictment was preserved in the trial court and is waived.

Appellant's ineffective assistance claim in his motion for new trial centered around his trial counsel's alleged failure to present a defense based on his erectile dysfunction. In his original brief on appeal he argued that trial counsel should have objected, but the basis for the objection he says should have been made is not articulated; it seems to be predicated upon a lack of notice, which is part of the substantial rights prong of the analysis. His petition to this court makes a novel argument that trial counsel should have objected based on a statutory interpretation of Article 28.10, but that interpretation is not yet found in the decisions of this Court or the courts of appeal, and runs counter to the only current case law on point. *Strickland* and the opinions of this Court have long held that counsel will not be held ineffective where the claimed error is

based on unsettled law. Moreover, Appellant asserts that no reasonable counsel could have strategically chosen to go to trial on the indictment as amended, but does not explain why this is so. Appellant's defense to all four counts was the same and he was in jail awaiting trial; it is reasonable for trial counsel to choose not to delay the case unnecessarily.

ARGUMENT

Factual Background

Harold Gene Jefferson (Appellant) was charged on January 12, 2017 in a two count indictment for sexual assault and indecency with a child by contact, with two felony priors alleged in each count. (CR: 11-12) Count one alleged that he intentionally and knowingly caused the penetration of the female sexual organ of CNM, a child younger than 17 years of age, with his male sexual organ. (CR: 11) Count two alleged that he intentionally and knowingly touched the breast of CNM, a child younger than 17 years of age, with the intent to gratify his own sexual desire. (CR: 12)

The State filed a motion to amend the indictment on June 4, 2018, requesting to add two new counts to the indictment alleging that Appellant intentionally and knowingly caused the mouth of CNM, a child

younger than 17 years of age, to contact his male sexual organ, and that Appellant intentionally and knowingly caused the female sexual organ of CNM, a child younger than 17 years of age, to contact his own mouth, with two priors again alleged in each count. (CR: 42-49) The court granted the motion to amend. (CR: 50) Appellant's trial counsel filed a motion on June 7 demanding that the court postpone the trial setting for ten days pursuant to Art. 28.10(a). (CR: 51-52) The court granted the motion postponing the trial. (RR2: 53)

A jury trial commenced on June 25, 2018. (RR2: 1) At trial, it was established that CNM was a 15 year old runaway who made an outcry of sexual abuse. (RR3: 23) The child's father had flagged down an Abilene Police Department officer and asked for his assistance in locating his daughter, who he believed to be in a house across the street. (RR3: 42-43) A woman in her 20's answered the door and stated that the child was no longer there, but the officer found her asleep in a bedroom. (RR3: 44-45, 55) The child told police that she was sexually assaulted at 2233 North Mockingbird by a black male she knew whose first name was Harold. (RR3: 24) CNM picked Appellant out of a photographic lineup and a warrant was issued for his arrest. (RR3: 39) A search warrant for

Appellant's DNA was also obtained for comparison with a swab taken during the child's sexual assault examination. (RR3: 27-30, 39)

A Sexual Assault Nurse Examiner testified that the child told her that Appellant had smoked crack with her and had sex with her. (RR3: 88-89) She told her that there was penetration of her female sexual organ and that Appellant made her perform oral sex on him. (RR3: 89) She indicated that she thought Appellant bit her in the genital area. (RR3: 90) Appellant used Jergen's cocoa butter as a lubricant, which the SANE said was a detail that lended her version of events credibility. (RR3: 90) She indicated she had not had sexual intercourse before. (RR3: 91) She had a small contusion just under the clitoral hood, and a cyst on her labia majora that had an abrasion in the center of it. (RR3: 97) She testified that these can be a result of blunt force trauma caused by missing the vagina during penetration or oral or manual manipulation that was too rough. (RR3: 98) The injuries were consistent with the timeline that she gave of when the assault occurred. (RR3: 98-99) Swabs taken from CNM's breast were compared to Appellant's DNA profile by a forensic DNA analyst, who testified that "[o]btaining this profile is 181 quadrillion times more likely if the DNA came from Suspect Jefferson than if the

DNA came from [CNM] and one unrelated, unknown individual. Based on the likelihood ratio result, Jefferson cannot be excluded as a possible contributor to this profile." (RR5: 122)

The child testified that Appellant had smoked crack with her and sexually assaulted her. She said that he had difficulty achieving an erection but that he had penetrated her vagina with his penis. (RR5: 77-78) They had sex several times and he had her perform oral sex on him. (RR5: 66) He said that he would give her more drugs in return. (RR5: 67) She told him that she was 15 years old but he did not care. (RR5: 67) She testified that he also performed oral sex on her and contacted her female sex organ with his mouth. (RR5: 69) He touched her breasts with his hand. (RR5: 69) She did not remember him putting his mouth on her breasts but said "obviously it did happen if y'all found the DNA on me. I just don't remember." (RR5: 69)

After hearing evidence and argument, the jury found Appellant guilty of sexual assault as charged in counts one, two, and three of the indictment, and indecency with a child by contact as charged in count four of the indictment. (RR5: 224-225) Following a punishment hearing the jury sentenced Appellant to 35 years, 45 years, 45 years, and 25 years

confinement in TDCJ-ID on counts one through four respectively. (RR6: 77) (CR: 89-96)

Motion for New Trial

Appellant filed a motion for new trial, alleging that Appellant's trial counsel was constitutionally ineffective. (CR: 110-117) Appellant's chief complaints were that counsel did not seek to admit medical records and expert testimony regarding Appellant's treatment for impotence, and that Appellant was unaware of the amended indictment prior to trial, which led to a loss of trust and breakdown of communication. (CR: 110-117) There was no allegation in the motion for new trial that the indictment was improperly amended or that trial counsel was ineffective in not objecting to the amended counts.

A hearing on the motion was held on August 17, 2018. (Supp. RR2: 1)

Testimony of Dr. Imran Yazdani

Appellant presented the testimony of Dr. Imran Yazdani, a doctor employed with the Veterans Affairs Outreach Clinic in Abilene. (Supp. RR2: 8-9) He was a treating physician for Appellant at the VA clinic. (Supp. RR2: 9-10) He testified that Appellant was diagnosed with high

blood pressure, high cholesterol, mental health issues, erectile dysfunction, and some substance issues. (Supp. RR2: 11) He also suffered from prostate cancer at one point, for which he received radiation treatments. (Supp. RR2: 12-13) He testified that 35 to 40 percent of patients may have erectile dysfunction after prostate cancer treatment. (Supp. RR2: 14-16) He testified that Appellant had a number of other factors which can contribute to erectile dysfunction, such as high blood pressure, high cholesterol, mental health issues, mental health medication, and substance use. (Supp. RR2: 19-20) He noted that Appellant's records stated that he was prescribed Levitra and that Appellant reported that it "did not work." (Supp. RR2: 22) Appellant was first prescribed an increased dosage, then switched to Viagra. ((Supp. RR2: 22-23) He testified that he was not contacted by Appellant's counsel. (Supp. RR2: 29)

On cross-examination he agreed that Appellant was given a normal, therapeutic dosage of the medications. (Supp. RR2: 33-34) He agreed that after the dosage was increased and Appellant was switched to Viagra that he continued asking for the medication until 2016 and did not ask that the dosage be further increased. (Supp. RR2: 34-35) He was asked if

under these circumstances "we can assume that the dose is working, right?" and responded "[y]es." (Supp. RR2: 35) He agreed that Appellant's medical records also stated that he had been diagnosed with chronic antisocial personality disorder. (Supp. RR2: 37-38)

Testimony of Lynn Ingalsbe, Appellant's trial counsel

Appellant's trial counsel Lynn Ingalsbe was called to testify. (Supp. RR2: 50) He testified that he had given the case file to Appellant's new counsel. (Supp. RR2: 51-52) He testified that the State's original offer of 30 years "decreased to ten years as a result of some glitches that occurred during the trial, and I told Mr. Jefferson I thought it was a very reasonable offer and that he should take it, but he refused." (Supp. RR2: 56) He testified Appellant said that he didn't do it, that it was a bogus charge, and that he did not believe CNM or the other witnesses would come to trial and testify. (Supp. RR2: 57) He testified that Appellant said that he had prostate cancer but never told him about erectile dysfunction until the day of trial. (Supp. RR2: 57)

He testified that he did receive discovery and did go over it with Appellant. (Sup. RR2: 59-60) He testified that Appellant told him that witnesses would testify that he was never alone with CNM to the point

where any of this happened, such as his niece, his sister, and her boyfriend. (Supp. RR2: 61-62) He was asked why he did not pursue the defense that he could not have committed the offense due to erectile dysfunction and replied "[h]e didn't tell me until the day of trial that he had erectile dysfunction. What he told me previously during one of our visits was that he had been diagnosed with prostate cancer. He never said that it resulted in erectile dysfunction, and for that matter, there's only one of the four counts that that would have been a defense to any way." (Supp. RR2: 62) He said that had Appellant told him that early on he would have wanted to pursue it. (Supp. RR2: 63) He did not specifically recall Appellant claiming that he was impotent from the video and did not remember arguing Appellant's impotence at trial. (Supp. RR2: 64) He was asked about the possibility of securing an expert to testify about erectile dysfunction and replied:

> No. I'm not aware of whether or not there are experts able to give that opinion. The -- only one of the four counts accused him of penetrating her female sexual organ with his sexual organ, and even testimony about erectile dysfunction that would negate the possibility of that occurring would have had no relevance whatsoever to the other three counts upon which he was convicted. And so it was -- in the first place, he never told me that he had erectile dysfunction other than what's in that tape and his – told me he had prostate cancer. His – he – he simply said he didn't do it, that he did no sexual

> acts with a girl at all. But he was also accused in the other three counts of touching her breasts with an attempt to arouse and gratify his sexual desire as well as her touching him – his private parts [with] her mouth and him touching her private parts with his mouth, against which erectile dysfunction would have no bearing.

(Supp. RR2: 67-68) He testified as regards the motion to amend that it was granted after a hearing at which he objected and for which Appellant was present. (Supp. RR2: 69-70) He testified that Appellant was given a copy of the amended indictment and that it was discussed at the hearing and at their next meeting. (Supp. RR2: 71) He denied Appellant expressing surprise when the indictment was read and said that it did not happen. (Supp. RR2: 72) He testified as to his discussions with Appellant about the benefits and risks of testifying, and testified as to Appellant's allegation that he revealed confidential information to the district attorney. (Supp. RR2: 72-78)

On cross-examination, Mr. Ingalsbe related that he had been a board certified criminal defense attorney since 1979 and had held office as the criminal district attorney for the 42nd and 104th districts and as a county court at law judge. (Supp. RR2: 82) He testified that he had provided good representation, as Appellant received the minimum on one charge and had not received the maximum on any of them in spite of his

criminal history. (Supp. RR2: 82) He said that Appellant told him that he did a good job during trial. (Supp. RR2: 88) He was asked if the medical records showing that he was a sociopath and was disciplined in the military might be detrimental if shown to the jury and replied "[a]bsolutely, and particularly if those records show a diagnosis from a medical professional of chronic antisocial personality disorder, it would be devastating." (Supp. RR2: 94)

Testimony of Harold Jefferson, Appellant

Appellant testified that his trial counsel "really wasn't interested. He was more interested in telling me what the DA had, that they had my DNA, and he more or less bullied me trying to get me to – I would say trying to get me to crack or ask for a plea bargain, and I wouldn't, so he never talked too much about the case." (Supp. RR3: 10) He said that he didn't think Mr. Ingalsbe got the discovery and never told him that he did. (Supp. RR3: 10) He said Mr. Ingalsbe insinuated that he had something to do with Patricia Markham's death. (Supp RR3: 15) He said that they never discussed trial strategies. (Supp. RR3: 15)

He said that he told Mr. Ingalsbe about his erectile dysfunction the first day that they met. (Supp. RR3: 16-17) He said that he offered to get

tested to prove that he was impotent and to prove that the DNA was not his own. (Supp. RR3: 17) He said that he asked Mr. Ingalsbe for a bond reduction and never got a reply. (Supp. RR3: 19)

He testified that he first saw the motion to amend the indictment on the 20th when Mr. Ingalsbe came to the jail before the trial. (Supp. RR3: 21-22) He said that he did not know that the indictment had gone from two counts to four counts until he arrived at court and the indictment was read. (Supp. RR3: 22) He was asked to clarify whether trial counsel discussed it with him at the jail and said he did not. (Supp. RR3: 22) He said that Mr. Ingalsbe never showed him any reports or statements, and that he requested another lab test to show that the DNA was not his. (Supp. RR3: 24) He said that when he said that he wouldn't testify that he noticed that the district attorneys were visibly pleased. (Supp. RR3: 26) He had complaints regarding some of the testimony of Nurse LaFrance. (Supp. RR3: 30)

He testified that he has congestive heart failure, hypertension, had received radiation therapy for prostate cancer, and had been diagnosed with erectile dysfunction. (Supp. RR3: 36) He testified that he was unable to have sex at all. (Supp. RR3: 38) He testified that he was afraid of

Viagra because it can cause organ failure and cardiac arrest, but that he had tried it anyway and is still didn't work. (Supp. RR3: 38-39) He testified that he continues to receive prescription medications that he doesn't use and throws them away. (Supp. RR3: 39)

He denied ever being read the discovery or discussing it. (Supp. RR3: 41-42) He testified that he told Mr. Ingalsbe that he didn't get out of the penitentiary until the 8th and Mr. Ingalsbe only responded that this case happened on the 6th. (Supp. RR3: 42) He said that Mr. Ingalsbe was "more like a prosecutor than he was a defense lawyer," that he never explained anything to him, and that he never showed him any kind of evidence. (Supp. RR3: 42) He claimed Mr. Ingalsbe stole all of the money from his bank account. (Supp. RR3: 43)

Testimony of Frankie Ware

Ms. Ware is Appellant's sister. (Supp. RR3: 44) She testified that they told Mr. Ingalsbe about Appellant's prostate cancer and that maybe he could get his medical records. (Supp. RR3: 47) She was asked if she told him about his erectile dysfunction and testified "I think my sister did mention it." (Supp. RR3: 47) She said Mr. Ingalsbe told them to get his medical records. (Supp. RR3: 47)

Testimony of Jacob Blizzard, attorney at law

Appellant's retained appellate counsel took the stand to testify. (Supp. RR3: 49) He testified that he is familiar with various medical tests that can be done for erectile dysfunction and described in detail the mechanics of how three of those tests are performed. (Supp. RR3: 70) He said those tests were not performed in this case. (Supp. RR3: 71) He agreed that he had not retained an expert to perform them either, saying that he had not had time. (Supp. RR3: 70) He agreed that he did not know how Appellant would perform on them. (Supp. RR3: 70)

At no time during Mr. Blizzard's testimony or that of any other witness was Article 28.10 discussed, nor was it discussed in closing argument.

After hearing evidence and argument, the court took the matter under advisement. (Supp. RR3: 88) The court denied Appellant's motion for new trial by written order on September 10, 2018. (CR: 142)

In the Court of Appeals:

Appellant appealed to the Eastland Court of Appeals in two issues. Issue One alleged ineffective assistance of counsel; Issue Two argued that the judgment was void under *Nix v. State* as to counts two and three.

I. Analysis – Ground One, Improper Amendment under Art. 28.10 (c)

a. Appellant's current complaint is unpreserved. No challenge or objection to the indictment was made in the trial court. Appellant's argument in this Court does not comport with his argument in his original brief to the court of appeals, which was that the judgment was void under *Nix v. State*.

Generally, to preserve an issue for appellate review, the complaining party must first raise the issue in the trial court. Tex. R. App. P. 33.1(a). Preservation requires a timely, specific objection or request. *Dixon v. State*, 595 S.W.3d 216, 223 (Tex. Crim. App. 2020). "The burden of preserving error for appellate review rests on the party challenging the trial court's ruling." *Spielbauer v. State*, 622 S.W.3d 314, 318 (Tex. Crim. App. 2021). The burden is placed on the complaining party in order "to prevent blindside attacks on the trial court's rulings." *Id.* "[O]ur preservation rules are intended to protect the trial court's judgment from reversal based on arguments never heard by the trial court." *Id.* Appellant's current argument concerning the proper construction of Tex. Code Crim. Proc. Ann. art. 28.10 was never heard in the trial court, either prior to the trial or in the motion for new trial. No objection to the indictment was made or preserved on the record. An

objection to an improper indictment must be made in the trial court or it is waived on appeal. *State v. Murk*, 815 S.W.2d 556, 558 (Tex. Crim. App. 1991).

Appellant's ineffective assistance argument in his Ground Two (Issue One in the court of appeals) is premised on his assertion that he was prejudiced due to his trial counsel's proceeding to trial under the amended indictment without objection. This concedes that no timely, specific objection or request was made in the trial court. In his motion for new trial, Appellant did not object to the indictment or argue that trial counsel should have done so. Rather, Appellant instead argued that Appellant was not fully informed of the amended counts and that it led to a loss of trust between them:

> Defendant's trial counsel did not inform him of the charges against him, in that he did not inform him that he was facing four felony charges, rather than the original two. Defendant only learned about all of the charges against him at the time of trial when the charges were read aloud. When Defendant asked Mr. Ingalsbe how Defendant could have more charges, Mr. Ingalsbe indicated that Defendant should not say anything about that, which lead to a loss of trust, loss of confidence, and an inability to properly communicate between Mr. Ingalsbe and Defendant.

(CR: 112) Appellant made no argument in his motion for new trial that the indictment was improperly amended or that trial counsel was

ineffective in not objecting to the indictment; Appellant only argued that the amended indictment led to a breakdown in communication. Appellant never argued at the hearing on the motion for new trial that the indictment was improperly amended or that trial counsel was constitutionally ineffective for proceeding on the indictment as amended. Appellant's sole argument at the motion for new trial was that trial counsel was ineffective in failing to present a defense based on erectile dysfunction.

Neither was Appellant's statutory argument as to the indictment made in the court of appeals. Rather, Appellant argued in his Issue Two in the Eastland Court that the judgment was void as to counts two and three under *Nix v. State,* 65 S.W.3d 664 (Tex. Crim. App. 2001). This is a very different argument, and one not dependent on error preservation in the trial court.

Appellant's argument as to the allegedly void judgment in his brief to the court of appeals read as follows:

> The void judgment exception recognizes that there are some rare situations in which a trial court's judgment is accorded no respect due to a complete lack of power to render the judgment in question. *Nix v. State,* 65 S.W.3d 664, 667-68 (Tex. Crim. App. 2001). A void judgment is a "nullity" and can

be attacked at any time. *Id.* Therefore, Appellant may present the issue for the first time on appeal.

Appellant's judgments as to counts 2 and 3 are void.

Bailey v. State, No. 10-12-00050-CR, 2013 WL 3770947, at *2 (Tex. App. July 18, 2013) sets out the ways in which a judgment is void: A judgment of conviction for a crime is void only when: (1) the document purporting to be a charging instrument does not satisfy the constitutional requisites of a charging instrument, and thus, the trial court has no jurisdiction over the defendant; (2) the trial court lacks subject-matter jurisdiction over the offense charged; (3) the record reflects that there is no evidence to support the conviction; or (4) an indigent defendant is required to face criminal trial proceedings without appointed counsel when the right to counsel has not been waived. (internal citations omitted). The Texas Constitution requires that, unless waived by the defendant, the State must obtain a grand jury indictment in a felony case. *Rivers v. State*, No. 05-16-00847-CR, 2017 WL 1536513, at *6 (Tex. App. Apr. 27, 2017) (citing *Teal v. State*, 230 S.W.3d 172, 174 (Tex. Crim. App. 2007); see also Texas Const. Article I, § 10). Absent an indictment or valid waiver, a district court does not have jurisdiction over that case. *Id.* Texas Const. Article V, § 12(b) states "An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of an offense." Here, it is undisputed that the grand jury did not indict Appellant with the counts 2 and 3 in the amended indictment. The charges were added by the District Attorney's Office without authorization from the grand jury. The return of an indictment being necessary to grant the court jurisdiction over Appellant as to counts 2 and 3, make the judgment rendered from such unauthorized charges void. The trial court had no jurisdiction to hear charges against Appellant to which the grand jury did not charge. Judgments

> for counts 2 and 3 should be declared void by this Court and Appellant released from their hold on him.

Appellant's brief at 20-21. The judgment is clearly not void under *Nix:* The charging instrument is valid on its face, the court has subject-matter jurisdiction over the offense, the record reflects evidence to support the conviction, and Appellant was represented by counsel. The opinion of the court of appeals addressed that issue alone and disposed of it briefly:

> In his second issue, Appellant contends that his convictions for Counts Two and Three are void because he was never indicted by a grand jury for these offenses. These two counts were for sexual assault of a child that were added by the amended indictment. The procedures for amending charging instruments are set out in Article 28.10. Tex. Code Crim. Proc. Ann. art. 28.10 (West 2006); see *State v. Murk*, 815 S.W.2d 556, 558 (Tex. Crim. App. 1991). An indictment that is improperly amended under Article 28.10 is not void but, rather, is only voidable, and a defendant waives any error to an amended indictment by failing to object to it at trial. *Trevino v. State*, 470 S.W.3d 660, 663 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (quoting *Woodard v. State,* 322 S.W.3d 648, 657 (Tex. Crim. App. 2010), for the proposition that "the 'right to a grand jury indictment under state law is a waivable right'").
>
> Because the right to be indicted by a grand jury is a waivable right, convictions on counts added by an amended indictment are not void. See *Woodard*, 322 S.W.3d at 657; *Trevino,* 470 S.W.3d at 663. Accordingly, we overrule Appellant's second issue.

Jefferson v. State, No. 11-18-00184-CR, 2021 Tex. App. LEXIS 4843, at *6-7 (Tex. App.—Eastland June 17, 2021) (mem. op.). The above is the sum total of what was argued and what was held in the Court of Appeals. It does not address the statutory construction issue because Appellant had not made it.

None of the statutory argument Appellant now makes concerning Article 28.10 was made at any time in the trial court, either by Appellant's trial counsel or in his motion for new trial. Neither was it made in his original brief to the court of appeals; it was made for the first time in Appellant's motion to rehearing in response to the court of appeals' reasoning on his ineffective assistance issue, not to his challenge to the judgment as void. The Court has generally refused issues not first raised in the courts of appeal. *Ex parte Queen,* 877 S.W.2d 752, 755 n.4 (Tex. Crim. App. 1994) ("appellant did not present his state constitutional argument to the Court of Appeals, and by raising it for the first time in this Court, we are not presented with a decision of the Court of Appeals to review"); *Bynum v. State*, 767 S.W.2d 769, 776 (Tex. Crim. App. 1989) ("[t]his Court will not consider a ground for review that does not implicate a determination by the court of appeals of a point of error presented to

that court in an orderly and timely fashion"); *Leal v. State*, 773 S.W.2d 296, 297 (Tex. Crim. App. 1989) ("Because that contention was not presented in the court of appeals, we now find our decision to grant appellant's petition for discretionary review was improvident")

In *Spielbauer*, cited above, this Court recently trimmed back its holding in *Rochelle v. State*, 791 S.W.2d 121 (Tex. Crim. App. 1990) and held that an appellee may raise an issue for the first time in a motion for rehearing in the court of appeals, but that is because the appellee is generally defending the court's ruling, has no duty of preservation, and indeed has no duty to file a brief at all. The State would submit that an issue raised by an appellant for the first time in a motion for rehearing that the court of appeals declined to consider should not merit this Court's review.

II. Analysis – Ground Two, Ineffective Assistance of Counsel

a. Appellant's ineffective assistance argument in his original brief in the court of appeals as concerns the amended indictment argued that trial counsel should have objected to insufficient notice and did not make the substantive argument he now advances.

Appellant's ineffective assistance argument in the court of appeals alleged four errors on trial counsel's part. One through three dealt with

trial counsel's alleged failure to investigate, present, and secure an expert to present a defense on erectile dysfunction.

The fourth error alleged dealt with Appellant's alleged failure to object to the indictment. That argument read in full:

> Art. 28.10 states in relevant part:
>
> > An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.
>
> Tex. Crim. Proc. Code Ann. § 28.10 (West). The State filed a motion to amend the indictment which changed Appellant's charged offenses from one count of sexual assault and one count of indecency with a child to three counts of sexual assault and one count of indecency. CR 42-49. The trial court granted the amendment the same date, within just minutes of the State filing of the motion. CR 49.
>
> Although the motion purports that trial counsel was served with a copy of the motion, such is likely impossible. The time between filing and the order alone is almost simultaneous. Additionally, trial counsel stated that in fact he did receive notice, he appeared at the hearing and he objected to the additions. He testified Appellant was present and that all of it was recorded in open court on the record, and should appear on the court's docket sheet as well. RR Supp. 2:70-71.
>
> In fact, none of those things happened. There was no recorded hearing, there was no entry on the docket sheet, and there was no appearance by Appellant. The State did not attempt to refute in its closing argument that there was no such hearing. The court reporter's records show no such

> hearing occurred. See RR Vol. 1. The trial court's docket sheet notes that on June 4, 2018 "granted motion to amend indictment." CR 145. No hearing is noted on the docket sheet. Even if a hearing existed as trial counsel claims, trial counsel failed to preserve an objection to the amendment by requiring the hearing to be recorded or objecting in writing to the lack of a court reporter. Trial counsel's failure to either object, preserve the error for review, or otherwise file a motion to quash the indictment (if no notice was provided) constituted ineffective assistance of counsel. These unprofessional errors were detrimental to Appellant. If simply for the fact that Appellant received 10 years more on his sentences for the counts added by the amendment, 45 years on count 2 and 3 versus 35 and 25 years on counts 1 and 4. Had trial counsel acted professionally, the objections would have prevented the motion from being granted in accordance with Art. 28.10 because the indictment amendment charged Appellant with two additional offenses of sexual assault not authorized by the grand jury. Therefore, this Court should reverse Appellant's convictions and remand the case for a new trial on the merits.

Appellant's brief at 18-20. The crux of the issue is trial counsel's "failure to either object, preserve the error for review, or otherwise file a motion to quash the indictment (if no notice was provided) constituted ineffective assistance of counsel." *Appellant's brief at 19*. No argument concerning the statutory interpretation of Article 28.10 is made, none of the case law appellant now cites is cited. No case law is cited at all. Appellant now argues that trial counsel was constitutionally ineffective for not making an argument that he himself did not make in his motion for new trial or on appeal.

b. Even if Appellant's current interpretation of Article 28.10 is correct, it is by his own admission a novel issue never ruled on by this Court and counter to the rulings of other courts. The U.S. Supreme Court in *Strickland* and this Court's case law have long held that counsel will not be found ineffective where the claimed error is based upon unsettled law.

This Court has unequivocally stated that "we have repeatedly declined to find counsel ineffective for failing to take a specific action on an unsettled issue." *State v. Bennett*, 415 S.W.3d 867, 869 (Tex. Crim. App. 2013) (refusing to find trial counsel ineffective when statute of limitations question is unsettled). "[L]egal advice which only later proves to be incorrect does not normally fall below the objective standard of reasonableness under *Strickland*." *Ex parte Chandler*, 182 S.W.3d 350, 359 (Tex. Crim. App. 2005). Counsel cannot be faulted for not anticipating law which was not clarified until the highest court has handed down a definitive opinion. *Id.* at n.38.

Strickland itself states that "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S.

668, 671 (1984). The Court has taken this passage to mean that trial counsel cannot be faulted for not anticipating this Court's future rulings. "We have said that basing an ineffective assistance claim on caselaw that is unsettled at the time of counsel's actions 'would be to engage in the kind of hindsight examination of effectiveness of counsel the Supreme Court expressly disavowed in *Strickland*…'" *Vaughn v. State*, 931 S.W.2d 564, 567 (Tex. Crim. App. 1996) (quoting *Ex Parte Davis*, 866 S.W.2d 234, 241 (Tex. Crim. App. 1993)).

Appellant did not argue in his original brief the grounds under which trial counsel should have objected, only that he should have done so. In response the Eleventh Court cited case law that supports the amendment of the indictment as was done in the trial court. In *Duran v. State*, No. 07-07-0110-CR, 2008 Tex. App. LEXIS 2160 (Tex. App.—Amarillo Mar. 26, 2008, pet. ref'd) (mem. op), the Seventh Court of Appeals held that amending an indictment to add additional counts of the same statutory offense is allowed under Article 28.10(c), citing this Court's opinion in *Flowers v. State,* 815 S.W.2d 724, 725-727 (Tex. Crim. App. 1991). There are no court of appeals opinions to the contrary and no case law from this Court directly addresses the same issue. Appellant's

assertion that the Eleventh Court erred in relying on *Duran* misses the point the Court was making: that there is case law supporting trial counsel's action. Counsel cannot be faulted for not anticipating a ruling no court has yet made.

c. There was an objectively strategic reason for proceeding under the amended indictment.

Appellant argues that his trial counsel could not possibly have had any reason for proceeding to trial, but never articulates exactly why that is so. Appellant does not address the Eleventh Court of Appeals' holding that there was an objectively strategic reason to proceed on the amended indictment:

> Even if we assume that trial counsel did not oppose the amendment, the State cites *Stewart v. State*, No. 05-95-01056-CR, 1997 Tex. App. LEXIS 2103, 1997 WL 196357, at *4 (Tex. App.—Dallas Apr. 23, 1997, no pet.) (not designated for publication), for the proposition that trial counsel might have a strategic reason for not opposing a requested amendment. In *Stewart*, the Dallas Court of Appeals noted that trial counsel might not want to oppose a requested amendment in order to avoid unnecessary delay. Id. The State additionally notes that Appellant's defensive theory was the same for all offenses. *See* [*Hillin* v. State, 808 S.W.2d 486, 488 (Tex. Crim. App. 1991)] (defendant's substantial rights are not affected if his right to present a defense is not impaired).

Court's opinion at 10-11. Appellant's counsel stated in the motion for new trial hearing that he did object to the amendment; however, he appears to

have been referring to his "Demand for Postponement" in which he demanded and received the statutory ten additional days to prepare to which he was entitled under Tex. Code Crim. Proc. Ann. art. 28.10 (a). (CR: 51-52) The matter was dropped after trial counsel's response and his meaning was never explained. Trial counsel's reasoning for the actions he took and did not take were not fully explored through direct or cross-examination at Appellant's motion for new trial hearing, nor could they have been under Tex. R. App. P. Rule 21 and this Court's jurisprudence, as the alleged failure to object to the indictment was not in the motion for new trial. *See State v. Zalman*, 400 S.W.3d 590, 595 (Tex. Crim. App. 2013); *Cueva v. State*, 354 S.W.3d 820, 822 (Tex. Crim. App. 2011) (Alcala, J., concurring, joined by Price and Cochran, JJ, noting that Appellant may not raise new ineffective assistance ground at evidentiary hearing on motion for new trial).

d. The Seventh Court's opinion in *Duran* is a reasonable construction of Article 28.10(c) and this Court's opinion in *Flowers*.

As the Eastland Court noted, *Duran* held that an amended indictment does not allege an additional or different offense if it adds another count of the same charged statutory offense, relying on this

Court's opinion in *Flowers v. State*, 815 S.W.2d 724, 728 (Tex. Crim. App. 1991). The Court said in *Flowers* that reading Article 28.10 differently would negate the utility of the statute:

> There are several reasons why this interpretation of Art. 28.10(c) is correct. First, the joinder provisions indicate that "different offense" means a different statutory offense. *Fortune*, supra; *Jordan*, supra. A change in an element of an offense changes the evidence required to prove that offense, but it is still the same offense. Second, to interpret "different offense" to include the same statutory offense with some change in the allegation of an element, effectively nullifies Art. 28.10(a) whenever a defendant objects. If the only purpose of the constitutional and legislative changes in 1985 was to require a defendant to object to any defect, this result might be acceptable. But, such an interpretation would also negate the usefulness of Art. 28.10(c). If a substance defect is the adding or changing of any element of the offense, *see Studer*, so as to charge a "different offense" under Art. 28.10(c), no indictment could ever be amended as to substance, over a defendant's objection. This would nullify the language of Art. 28.10(c) permitting a substance amendment over objection if the amendment did not charge "an additional or different offense." Every substance change would charge a "different offense." Because a statute should be interpreted to be effective, we do not so construe Art. 28.10(c). *See* Govt. Code § 311.021.
>
> *Flowers,* 815 S.W.2d at 728.

e. Even had trial counsel objected, Appellant's substantial rights were not prejudiced.

Article 28.10(c) also provides that an information may not be amended over the defendant's objection if the substantial rights of the

defendant are prejudiced. Tex. Code Crim. Proc. Ann. art. 28.10(c). The Court reviews the record to determine whether the pre-trial amendment of the charging instrument impaired the defendant's ability to prepare his defense. *Flowers*, 815 S.W.2d at 729; see *Hillin v. State*, 808 S.W.2d 486, 488 (Tex. Crim. App. 1991) (question in determining whether a defendant's substantial rights were prejudiced is whether a defendant had notice adequate to prepare his defense.); *Adams v. State*, 707 S.W.2d 900, 903 (Tex. Crim. App. 1986) (same).

This Court observed in *Flowers* that if an amendment is made on the basis of the same incident upon which the original indictment is based, it will, in most cases, be permissible under the substantial rights provision after a review of the record for prejudice. *Flowers,* 815 S.W.2d at 729 (citing *Adams*, 707 S.W.2d at 903). All of the counts arose out of the same incident, and Appellant's defense was the same as to all four: that CNM was untruthful and that none of the offenses happened. Appellant's trial counsel provided effective and vigorous representation.

Conclusion

This Court very recently observed that "[O]ur preservation rules are intended to protect the trial court's judgment from reversal based on

arguments never heard by the trial court." *Id.* Appellant's current argument concerning the proper construction of Article 28.10 was never heard in the trial court. It was not made in his original brief to the court of appeals. The State would request that the petition be refused as improvidently granted.

Appellant further asks this Court to find trial counsel ineffective for not making a novel argument against amending the indictment. Appellant himself did not make this argument in the trial court, in his motion for new trial, or in his original brief to the court of appeals. No case law from this court directly speaks on the issue, and the only case law from the lower courts is to the contrary. The Court does not find counsel ineffective under *Strickland* for failing to take a specific action on an unsettled issue. Moreover Appellant never fully addresses that trial counsel could well have had a strategic reason for choosing to proceed. Appellant was in jail awaiting trial, all of the counts arose from the same incident, and Appellant's defense was the same as to all four counts.

The State would finally note that Appellant's requested relief is for the entire case to be remanded to the trial court for new trial. The State would submit that if the Court were to find error and harm or ineffective

assistance and prejudice as to counts two and three, the proper remedy under Tex. R. App. P 78.1 would be deletion of those counts and reformation of the judgment, as the court does with improper cumulation orders, deadly weapon findings, and counts where the conviction is improper due to double jeopardy or lack of juror unanimity. The State nonetheless maintains Appellant has not met his burden of error preservation or demonstrating ineffective assistance of counsel.

PRAYER FOR RELIEF

The State respectfully requests that this Court affirm the judgments of the Eleventh Court of Appeals and the trial court.

Respectfully submitted,

James Hicks
Criminal District Attorney
Taylor County, Texas
300 Oak Street, Suite 300
Abilene, Texas 79602
325-674-1261
325-674-1306 FAX

BY: /s/ Britt Lindsey
Britt Houston Lindsey
Assistant District Attorney
Appellate Section
300 Oak Street, Suite 300
Abilene, Texas 79602

325-674-1376
325-674-1306 FAX
LindseyB@taylorcountytexas.org
State Bar No. 24039669
Attorney for the State

CERTIFICATE OF COMPLIANCE

I, Britt Lindsey, affirm that the above brief is in compliance with the Rules of Appellate Procedure. The font size in the brief is 14 point, except for footnotes which are 12 point. The word count is 7604, excluding the exceptions listed in Rule 9.4.

/s/ Britt Lindsey
Britt Houston Lindsey

CERTIFICATE OF SERVICE

I certify that on this 22nd day of March, 2022, a true copy of the foregoing State's Brief on the Merits was served on the parties according to the requirements of law by email or efiling to:

Jacob Blizzard
Sarah Durham
Blizzard & Zimmerman, P.L.L.C.
441 Butternut St.
Abilene, Texas 79602

Stacey Soule
State Prosecuting Attorney
P.O. Box 12405
Austin, Texas 78711

/s/ Britt Lindsey
Britt Houston Lindsey

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Britt Lindsey
Bar No. 24039669
lindseyb@taylorcountytexas.org
Envelope ID: 62820342
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Associated Case Party: HaroldGeneJefferson

Name	BarNumber	Email	TimestampSubmitted	Status
Morgan Walker		Morgan@blizzardlawfirm.com	3/22/2022 10:21:42 AM	SENT
Sarah Durham		sarah@blizzardlawfirm.com	3/22/2022 10:21:42 AM	SENT
Yazmin Flores		yazmin@blizzardlawfirm.com	3/22/2022 10:21:42 AM	SENT

Associated Case Party: The State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Britt Lindsey		lindseyb@taylorcountytexas.org	3/22/2022 10:21:42 AM	SENT

Associated Case Party: StateProsecutingAttorney

Name	BarNumber	Email	TimestampSubmitted	Status
Stacy Soule		information@spa.texas.gov	3/22/2022 10:21:42 AM	SENT